INDEX OF SUBJECT-MATTER

	Page
The Infringing Method	2
The Stelos Commercial Method	4
Record in this case contains no substantial difference, except unreasonable length, from records in prior cases.	5
The disclosure of "a porcelain dish" as "a suitable holder" was a full and complete disclosure and satisfied the requirements of the statute	6
The claim does particularly point out and distinctly claim the improvement asserted as the invention or discovery	8
The Prior Art	10
Depositions	16
Defendants do infringe	17
Defendants do not avoid infringement by using a sliding latch needle	18
"Laterally out of Alignment with the run", as used in the claim, means at a substantial angle to the plane of the run	19
"Catching the next forward thread in the hook while the loop is being pulled over the latch, causing the latch to close over the thread" can be done by a sliding latch needle and is done by defendants	19
The defendants can and do hold their needle "laterally out of alignment with the run"	21
The latch of the sliding latch needle does "close over the thread"	23
Conclusion	24

INDEX OF DECISIONS

Page

Carnegie Steel Co. vs. Cambria Iron Co., 185 U. S. 403, 422, 423 11

Clark Thread Co. vs. Willimantic Linen Co., 140 U. S. 481, 492 14

Cochran vs. Deener, 94 U. S. 780, 784 2

Eibel Process Co. vs. Minnesota & Ontario Paper Co., 261 U. S. 45, 60 16

Finch Corp. vs. The Stelos Co., Inc. 46 Fed.(2d) 606, 607, 608 ..... 2, 5, 14, 18, 20

Goodyear Machine Co. vs. Spaulding et al, 101 Fed. 990, 994 9

Sanitary Refrigerator Co. vs. Winters, 280 U. S. 30, 42 21

Smith vs. Snow et al, 293 U. S. ——(Jan. 7, 1935) 2

Stelos Co. Inc. vs. Gearhart, 60 Fed. (2d) 1006 ..... 5, 10, 14

Stelos Co. Inc. vs. Stark 5, 10

Temco Electric Motor Co. vs. Apco Mfg. Co., 275 U. S. 319, 328 3

Tilghman vs. Proctor, 102 U. S. 707 ..... 2, 8

Union Paper Bag Machine Co. vs. Murphy, 97 U. S. 120, 125 18

Webster Loom Co. vs. Higgins, 105 U. S. 580, 586 8

Westinghouse Electric & Mfg. Co. vs. Stanley Instrument Co. (C.C.A. 1) 133 Fed. 167, 174 14

IN THE

Supreme Court of the United States

No. 588—October Term, 1934

THE STELOS COMPANY, INC.,

Plaintiff-Petitioner.

vs.

HOSIERY MOTOR-MEND CORPORATION,
KAYSER HOSIERY MOTOR-MEND CORPORATION,
JULIUS KAYSER & COMPANY,

Defendants-Respondents.

No. 653—October Term, 1934

HOSIERY MOTOR-MEND CORPORATION,
KAYSER HOSIERY MOTOR-MEND CORPORATION,
JULIUS KAYSER & COMPANY,

Defendants-Petitioners.

vs.

THE STELOS COMPANY, INC.,

Plaintiff-Respondent.

REPLY BRIEF FOR THE STELOS COMPANY, Inc.

The Brief filed herein for Hosiery Motor-Mend Corporation, Kayser Hosiery Motor-Mend Corporation, Julius Kayser & Company, a Corporation, as respondents in No. 588, and as cross-petitioners in No. 653, contains misleading argument and it should only be considered with cau-

tion, after a careful review of the record in this case. This Reply Brief will attempt to point out the true facts with respect to some of these points.

The Infringing Method

The defendants admit that they operate under Van Dyke patent, No. 1,745,462 (R. 994) and Finch patent, No. 1,674,508 (R. 1366A), and that they use a punch method through the fabric. They attempt to justify their infringement, as did Finch in the District of Columbia (*Finch Corporation vs. The Stelos Company*, 46 Fed. (2d) 606, 607) by the mere assertion that they use a sliding latch needle instead of a pivoted latch needle.

The Van Dyke patent of defendants shows, in Figs. 6 and 7, the equivalency of the pivoted and sliding latch needles and this alone should be sufficient answer to their arguments.

The Circuit Court of Appeals, for the Second Circuit, (R. 1341) as well as the Court of Appeals of the District of Columbia, held that infringement of a method was not avoided by a mere mechanical variation, to wit, the use of a sliding latch needle, in lieu of a pivoted latch needle. See *Cochran vs. Deener*, 94 U. S. 780, 788; *Tilghman vs. Proctor*, 102 U. S. 707, 730, 731; and *Smith vs. Snow et al*, 293 U. S. —— (Jan. 7, 1935).

It is urged by defendants that the Finch sliding latch needle is an improvement on the pivoted latch needle. Perhaps so, but that is no answer to the charge of infringement. So long as the method of the claim has been practiced, it is immaterial by what instrumentality, as the Circuit Court of Appeals, for the Second Circuit, correctly held. Even an improvement does not avoid infringement.

Temco Electric Motor Co. vs. Apco Mfg. Co., 275 U. S. 319, 328.

The defendants assert in their Brief:

> "A material function of the *pivoted* latch needle of the patent is to reach for and grasp the thread to be looped and force it into the hook".

It is not the function of the pivoted latch to force the thread into the hook; it is a characteristic of the Stephens long-latch needle when operated off at one side of the run, but as the witness, Dahn, correctly pointed out, if the latch is relatively short, it will not force the thread into the hook (R. 791). It is further stated in defendants' Brief that this function of reaching for and grasping the thread to be looped and forcing it into the hook "defendants believe, is expressed in the claim by the words 'causing the latch to close *over the thread*' ". This seems to be a new argument advanced for the first time on this appeal, because defendants' own expert witness, Chapman, testified that this characteristic of the Stephens needle with its long latch was not expressed in claim 23 in issue. He testified very definitely that this was a new thing which he had not found in the prior art, but that it was not even suggested in claim 23:

> "• • • He intended to convey the idea of means and function of a latch or a device calculated to force one of the strands of the run into the hook at a crucial moment, operating positively for that purpose.
>
> "Q138. Would that function be present in a method or device having a pivoted latch, as recited in claim 23? And you may answer qualified if that function is only present when a certain method is used or unqualified, if the function is present, however the pivoted latched needle be used. A. I have been unable to find in claim 23 anything which would suggest any such operation". (R. 600, fols. 1799-1800.)

Furthermore, the comparison of claims 10 and 23 on page 32 of plaintiff's main Brief in this Court will show that this feature was definitely recited in original claim 10, but was *purposely omitted* from claim 23 of the Stephens patent.

As the Court held in the Finch suit, the defendants' sliding latch needle performs all of the functions in the method of claim 23 of the pivoted latch needle and constitutes the full equivalent thereof. The Circuit Court of Appeals, for the Second Circuit, likewise held that a mere difference in structure of the needle itself would not avoid infringement.

The Stelos Commercial Method

The defendants attempt to distinguish what they call the "Stelos Commercial Method" involving the use of an egg cup instead of the broader term, "porcelain dish", from the method described in the patent and claimed in claim 23. They could not possibly be more mistaken. There has never been the slightest departure from the original disclosure. It is true that the plaintiff uses an egg cup in its commercial practice but this they have done from the first. Defendants also use an egg-cup-shaped holder as has practically every other infringer of this method, but the courts have invariably held that an egg cup used with the method of claim 23 constitutes an infringement of this claim. The Circuit Court of Appeals said that mere differences in the instrumentalities used would not avoid infringement.

There has been no real departure by plaintiff from the disclosure of the Stephens patent, perhaps a carrying forward of the same idea with greater speed and a flawless mend. But what pioneer patent of Bell, Edison, McCormick, Eli Howe, or others, showed all of the commercial

refinements that followed in its wake? Nevertheless, all such improvements must pay tribute to that pioneer patent.

The defendants refer repeatedly to a later Stephens application (R. 1218), and to a Dunn et al patent (R. 1209), in an effort to confuse the Court by what they term the Stephens commercial method, but the fundamental method of claim 23 was embodied in those later applications which were filed on improved features, such as an improved needle in the later Stephens application and an improved "flawless mend" in the Dunn et al patent. The defendants are entirely in error in their assertion that the last claim of the Dunn et al patent (R. 1216) "is precisely the same as the claim in suit", because they overlooked entirely the very gist of the Dunn et al invention, the "flawless mend", as set forth in the last three lines of claim 19, of that patent.

Record in this Case Contains no Substantial Difference, Except Unreasonable Length, from Records In Prior Cases

The Defendants make a great show of having produced a lot of new evidence in this case not produced in any of the other suits and while the testimony was greatly protracted, no fundamental new defenses have been raised here that have not been pleaded in previous suits. The Ceska and Semonsen patents urged so strongly here by defendants as showing "suitable holders" were cited in prior suits. The Ceska patent was involved in the suit in Kansas City, *The Stelos Co. vs. Stark*, and the Semonsen patents were cited in the Pittsburgh suit, *The Stelos Co. vs. Gearhart*, 60 Fed. (2d) 1006, and also in *Finch Corp. vs. The Stelos Co., Inc.*, 46 Fed. (2d) 606. All of the prior uses of Hartzell, Gearhart, and others, and the Gearhart instruction books that have been referred to by defendants in their Brief on this appeal were pleaded in the Gearhart suit. Gearhart, the defendant, was himself before the Court and

testified in that case, but his testimony and prior publications were held not to anticipate or limit the scope of claim 23, as the Court stated:

> "The patent in suit has not been anticipated by the Pogson application or by any of the patents or publications offered in evidence".

The Disclosure of "a Porcelain Dish" as "a Suitable Holder" Was a Full and Complete Disclosure and Satisfied the Requirements of the Statute

The holder which Stephens defined in his patent was a porcelain dish "allowing sufficient depth for the free use of the needle". Such a holder was necessary to permit him to work *through the fabric* instead of along the surface. Merely because an egg cup lends itself with peculiar fitness to the use of this method and has been selected by practically all infringers, the defendants assert that the method is limited to an egg cup and their argument proceeds on the theory that an egg cup is the only porcelain dish or holder that can be used to perform the method.

Their argument proceeds on a false premise, that only an egg cup is a "suitable holder", which is obviously erroneous, because they themselves do not use an egg cup and Finch did not, in the Finch suit. Finch used an aluminum cylinder that was not even porcelain or cup-shaped, but the Court of Appeals of the District of Columbia held, nevertheless, that he had used an equivalent and performed the same method, which therefore was an infringement. The defendants in this case have gone to the trouble of making an egg-cup-shaped holder out of aluminum.

The defendants refer to the testimony of some of the witnesses with reference to some dishes which could not be satisfactorily used in performing the method, such as

saucers, dinner plates, vegetable dishes, etc. All of these dishes are obviously not suitable. They are too shallow, not coming within the definition of the patent as having sufficient depth for the free use of the needle, or too large, so that the fabric could not be stretched over them by the hand of the operator. A person would hardly expect to stretch an ordinary stocking over a large dinner plate as the defendants attempted to show could not be done. That should be self-evident to an ordinary person skilled in this art. The mere fact that there are some dishes that could not be used satisfactorily with a stocking, does not show that it was perfectly obvious to select many porcelain or other dishes that could be used satisfactorily, such as small porcelain bowls, glasses, etc.

The Circuit Court of Appeals, for the Second Circuit, correctly held that the disclosure was entirely adequate as to the "suitable holder" of the claim:

> "It did not invalidate the patent, any more than did the failure to disclose an egg-cup as the 'suitable holder', as the judge supposed. The language of the specifications, 'porcelain dish, allowing sufficient depth for the free use of the needle' (page 1, lines 12-14), was entirely adequate. Any one who really wanted to practice the invention would easily find a convenient holder; a small glass, or a little coffee cup, or the like. Such a simple device is enough disclosed when it is described by its function."

Many sets of dishes include egg cups, bowls, tea or coffee cups, with or without handles, and many of these things are suitable holders as specified by the claim. The method is not restricted to an egg cup, and there was no need of disclosing it in the patent. Stephens recognized that many different forms of bowls or cups could be used and, therefore, he did not limit his disclosure to an egg cup. The disclosure was clear, definite, and sufficient, within the deci-

sions of this Court as in *Tilghman vs. Proctor*, 102 U. S. 707, 728, and *Webster Loom Co. vs. Higgins*, 105 U. S. 580, 586.

The Claim Does Particularly Point out and Distinctly Claim the Improvement Asserted as the Invention or Discovery.

The essential improvement which Stephens made in this art over the old finger method, which was the only prior art that was known at the time Stephens filed his application, was **the stretching of the fabric over a suitable holder** (defined in the patent as having sufficient depth for the free use of the needle) **and working through the fabric with a latch needle in order to reloop the run.**

In an effort to show the similarity between the Stephens method of working through the fabric and the admitted surface method described in the de Marr application (R. 1192), the defendants have copied two and only two paragraphs from the de Marr application for comparison with a short extract from the Stephens patent. They omit all of Stephens' description of his improved method, as set forth particularly in lines 10-13 and 49-94 of page 1 of his patent (R. 962). The similarity or differences cannot be shown merely because of the similarity or difference in a few words or sentences, or a couple of paragraphs. Even Judge Woolsey held that there could be no question but that the Stephens patent clearly and fully discloses the punch method through the fabric. (R. 765.)

Furthermore, the same descriptive terms which the defendants find used in the de Marr application were used in the later Stephens application (R. 1218) which the defendants admit discloses the punch method through the fabric. Please note the repeated use of the words, "forward" and "backward" or "reverse" at R. 1225, 1226, in this application.

As the Court said in *Goodyear Machine Co. vs. Spaulding et al*, 101 Fed. 990, 994:

> "Two things are not necessarily similar in a practical sense because the same words are applicable to each."

Furthermore, the Finch (R. 1366A) and Van Dyke (R. 994) patents, the teachings of which defendants admit that they follow, have practically the same disclosures which the defendants urge go back to the de Marr application, and all of these were merely followed for convenience of description as far as they applied and no further, just as Van Dyke copied his Fig. 6 from Fig. 5 of the Stephens patent to show the similarity between the two, but that doesn't invalidate his patent on his machine, **although it does show that he and defendants use the same method disclosed in the Stephens patent.**

The defendants also assert in their Brief that Stephens could not tell whether the needle in Fig. 4 was under or above the cross-thread *d*. The drawing itself is the safest evidence on this point and it should be evident from Fig. 4 that the needle is clearly shown under the cross-thread *b*, the one really in question, and that the needle is directed down through the fabric, which, therefore, constitutes a clear and definite illustration of the punch method, as the Courts have consistently held below and in prior suits.

The defendants attempt to inject into the argument the Stephens side guard which was purposely omitted from claim 23, as will be evident from the comparison between claims 10 and 23 on page 32 of plaintiff's main Brief. Such ~~claims 10 and 23 on page 32 of plaintiff's main Brief. Such~~ an element once dropped cannot be incorporated by construction. The claim already recites definitely the method which constituted the gist of the Stephens invention, namely, working through the fabric while stretching the fabric over a suitable holder in reknitting a run.

The Prior Art

Although the defendants argue that Pogson is the principal reference upon which they rely for anticipation of claim 23 in suit, they finally admit that Pogson really discloses no more than the old finger method, if the indefinite disclosure can be counted for anything. They have abandoned their argument that Pogson disclosed a punch method through the fabric. The Patent Office, when the question was twice before it on the original and reissue application, and the Courts in all of the prior suits, as well as the Circuit Court of Appeals, for the Second Circuit, have consistently held that the finger method (Pogson) did not anticipate the Stephens punch method. Therefore, Pogson may be disregarded from the standpoint of a punch method through the fabric.

While the defendants have urged that the finger method (Pogson) of working along the surface of the run might be used on various holders having depth, such as shown in Ceska, Graf, and others, it seems self-evident that such a combination of references would not anticipate claim 23 in suit because **the Pogson method of working over the surface of the run would still be a surface method, even if carried out on the Ceska or Graf holder.**

It was so decided by the U. S. District Court for the Western District of Missouri, in *The Stelos Company, Inc. vs. Stark,* in which the Ceska and Pogson patents were cited on the hearing, but were held insufficient to anticipate the Stephens method as defined in claim 23. And in *The Stelos Company, Inc. vs. Gearhart,* 60 Fed. (2d) 1006, the Court had before it Pogson and Semonsen but held that they did not anticipate Stephens.

It is well settled that the defendants cannot build up an anticipation of the method by showing that the needle

and holder were individually old and had previously been used in other and different methods. As this Court said in *Carnegie Steel Co. vs. Cambria Iron Co.*, 185 U. S. 403, 422, 423:

> "To anticipate a process patent it is necessary not only to show that the prior patent might have been used to carry out the process, but that such use was contemplated * * *. A process patent can only be anticipated by a similar process."

Although the Circuit Court of Appeals, for the Second Circuit, referred to Semonsen (R. 1342), Semonsen was not referred to as disclosing a punch method; it was used by the Court as disclosing "a holder in the form of a drum over the top of which the fabric was to be stretched". The entire consideration of Semonsen by the Court was only as a holder, and the Court recognized that even if the Pogson surface method should be performed on the Semonsen holder, it would require invention.

Here the defendants argue for the first time, never before suggested, that Semonsen discloses a punch method through the fabric. Only brief consideration of the Semonsen patents (R. 1069, 1073) is necessary to show the fallacy of this argument.

In the first place, the Semonsen needle or device was not a latch needle; it did not have a latch of any form. In fact, it was more of the character of a crochet hook and it was used in practically the same method which had long been used in reknitting runs with a crotchet hook, even prior to de Marr as we find described in the de Marr application (R. 1189-1190) and also in some of the old publications in the record (R. 1011, 1014, 1017, 1024), an essential feature of which was the catching of a cross-thread in the open crotchet hook with a sort of fishing action and **then turning the needle a quarter turn and pulling it back through the loop on**

the shank of the needle. This makes the work very slow, tedious, and eye-straining because the operator must watch every stitch closely. It is necessary to hold the loop on the shank of the needle while catching the cross thread. This fishing and turning is very clearly described in both of the Semonsen patents (R. 1071, lines 50-63 and 126-130; R. 1075, lines 44-54).

The use of the holder of Semonsen was not to permit downward movement of the needle through the fabric sufficiently to clear the latch of a latch needle because there was no latch, as in the Stephens patent; it was merely to give a slight space under the fabric to permit the peculiarly shaped crotchet hook devised by Semonsen to grasp one of the cross-threads, as shown clearly in Fig. 5 of Semonsen (R. 1073). Semonsen was no different in that respect from the cup-shaped darning holders of Ceska (R. 1061), Harley (R. 1039), and Graf (R. 1053).

In all of these patents, whether run reknitting as in Semonsen or darning as in Ceska, Harley, or Graf, the operation is essentially a surface method because the needle is worked back and forth along the surface. Semonsen did not change that surface method except to provide what he considered a new hook or a new holder and in his hook he turned the point so as to fish for the threads while holding the handle upwardly inclined to facilitate his crotcheting operation instead of having the point perfectly straight and in line with the body of the needle, as in the usual crotchet hook. But that difference in the construction of his hook did not change his crotchet method of fishing for the threads individually and of working along the surface as in the old finger method, which has been repeatedly urged as an anticipation of the Stephens punch method, but consistently over-ruled everywhere.

Another very noticable difference is that in Semonsen the fabric is *stretched* and *secured* which would be inimical to the Stephens method of constant and continuous stretching.

The statement in defendants' brief, that the inadequacy of the pleading of prior invention by Semonsen is raised for the first time in this Court is absolutely erroneous. The record shows that the objection was interposed when the Semonsen patents were offered in evidence (R. 496). It is true, however, that Semonsen has never been urged before this appeal as an anticipation or a prior invention, but merely for a holder of the type of Ceska, Graf, and others, and therefore, it was not considered of any importance.

It has been urged by plaintiff that Stephens invented his punch method of working through the fabric while stretching it over a suitable holder and introduced it into the United States in the early part of 1923, prior to the filing date of the Semonsen applications. The defendants assert that this argument is based on the oral testimony of Stephens and Losh and "is unsupported by any document". This is erroneous.

The defendants do not question the testimony of Stephens and Losh as to what they had; merely as to when they had it. Stephens was not testifying from memory alone; he produced his diary (R. 127) and refreshed his memory from it. These dates were corroborated not only by Losh, but also by the diary of his attorney, Hodges, (R. 153). Therefore, we do have record evidence as to the date of the Stephens invention. This evidence is uncontradicted and is clear and convincing.

On this point, a mere "preponderence of the evidence" is all that is necessary to prove prior invention by the pat-

entee, and not proof "beyond reasonable doubt", *Westinghouse Electric & Mfg. Co. vs. Stanley Instrument Co.* (C. C.A. 1) 133 Fed. 167, 174. The decision of this Court in *Clark Thread Co. vs. Willimantic Linen Co.*, 140 U. S. 481, 492, makes this clear:

> "After Weild's patent was introduced into the case, showing with certainty the date of its publication, and such date anterior to the issue of Conant's patent, it was incumbent on the plaintiffs, in rebuttal, to show, if not with equal certainty, yet to the satisfaction of the court, that Conant's invention preceded that date".

The publications referred to on pages 26 and 27 of defendants' brief were the Gearhart publications which really described an entirely different method from the one claimed, in that they require the picking up of the stitches on the machine by a machine needle during the course of the knitting operation. They were before the Court of Appeals of the District of Columbia, in *Finch Corp. vs. Stelos Co., Inc.*, 46 Fed. (2d) 606, 608, in which the Court disposed of them as follows:

> "It is an altogether different matter to repair a drop-stitch or run, in the midst of a fabric, in which no new thread is fed or knit in, but a thread already there is relooped and restored to place and finally fastened. Were it possible satisfactorily to repair a run by the use of a stocking knitting machine, it is evident that appellant would have used the machine instead of the method of the patent".

These publications aided by Gearhart's own testimony were before the Court in *The Stelos Company vs. Gearhart*, 60 Fed. (2d) 1006, but the Court held that claim 23 was not anticipated by these publications or by Gearheart's alleged prior use. In all of these, there was not a suggestion of working *through* the fabric while *stretching* it (as distinguished from *stretched*) over a suitable holder.

It is urged that the testimony of Hartzell and Mrs. Rohrbach, showed prior public use at least since 1920. It should be noted that the witnesses testified entirely from memory, as to evidence *occuring ten years before and concerning a method which was supposed to have been used then,* although they had been familiar with the Stephens method for several years prior to their testimony. There is not a word in the testimony showing any definite use of Stephens' punch method prior to 1923. There was general testimony as to the use of a finger method for a good many years, and the witness, Kolbe, testified that the only method ever used in the Kraemer Mill, (whence Hartzell and Rohrbach came) prior to 1928, was the finger method and Miss Kolbe worked there for twenty-two years, directly under Hartzell and side by side with Mrs. Rohrbach, Miss Kolbe testified clearly that Mrs. Rohrbach never used anything but the finger method during all of that time, and there is not a word by Mrs. Rohrbach concerning what she used or when she began the use of an egg cup with a punch method, but *Miss Kolbe testified that it was in 1928, after they had seen the Stelos method in use.*

Hartzell knew nothing definite except the finger method. He was unable to mend, and when he tried it, he used the surface method as he admitted (R. 513). The defendants offered what was supposed to have been a memorandum book, kept by Hartzell, which contained the following entries on the same page, 1901, 1902, 1900, April 1910 (R. 1144). He testified that he did not know when he made those entries (R. 525). There is nothing there to show use of a punch method, and in fact, he testified that at that time, they were using the finger method (R. 532).

Please mark the following:

The testimony shows that two Stelos needles were introduced into the Kraemer Mill by Hartzell himself at a monthly rental of $50.00 each, which is certainly inconsistent with the assertion that Hartzell had the same method. Does it seem reasonable that Hartzell would pay $100.00 a month rent for the use of two needles, if he had been using the same method ten or twelve years before. It certainly doesn't, and this is even stronger evidence in support of Miss Kolbe that the punch method was never used there, prior to the Stephens invention.

The testimony offered by Hartzell and Mrs. Rohrbach being entirely from memory and being emphatically contradicted by Miss Kolbe, does not clearly and definitely show that any method, other than the finger method, was used prior to 1923, and certainly this is insufficient to show prior public use. We are frank to say we doubt the veracity of both of these witnesses.

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45, 60:

> "• • • But there is not a single written record letter or specification • • •. The oral evidence on this point falls far short of being enough to overcome the presumption of novelty from the granting of the patent. The temptation to remember in such cases and the ease with which honest witnesses can convince themselves after many years of having had a conception at the basis of a valuable patent, are well known in this branch of law, and have properly led to a rule that evidence to prove prior discovery must be clear and satisfactory".

Depositions

The depositions taken in Milwaukee, Wisconsin, and the Gearhart depositions are referred to on pages 33 and 34

of defendants' brief, but it is evident from the character of this argument that defendants have abandoned any real attempt to show anticipation by these alleged prior uses and they were wise in doing so because the witnesses were testifying entirely from memory as to evidence occurring ten or twenty years before the testimony was given, some of the witnesses referring to dates back as early as 1893, which obviously will not do when unsupported by corroborating or documentary evidence. The witnesses showed finally that whatever they may have had in the earlier days, it was really the old finger method of working along the surface and whatever holders they may have referred to were really abandoned as not being practical with the finger method so that the entire set up was merely an abandoned experiment. The District Court below said that he considered this evidence and read every word of it, but evidently cast it aside as not supporting the charge of prior public use and it was not referred to by the Judge in his opinion or really urged before the Circuit Court of Appeals, for the Second Circuit.

Defendants Do Infringe

The District Court below did not pass on the phase of the case involving the liability of the defendant, Julius Kayser & Company, for the acts of its subsidiary, Kayser Hosiery Motor-Mend Corporation. Plaintiff therefore passed over the question on its appeal to the Circuit Court of Appeals, for the Second Circuit. That Court did not pass on the question, although defendants in their brief argued the non-liability of Julius Kayser & Company. Plaintiff has again, in this Court, passed over the question, and it is again argued in defendants' brief.

Plaintiff respectfully represents to this Court that the question of the liability of Julius Kayser & Company for the acts of its subsidiary should be remanded for further proceedings not inconsistent with the decision of this Court on the question of infringement.

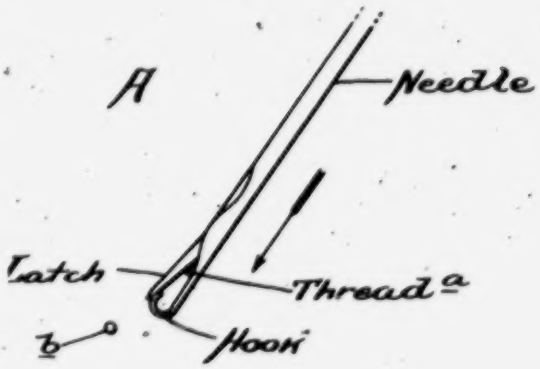
Defendants Do Not Avoid Infringement by Using a Sliding Latch Needle

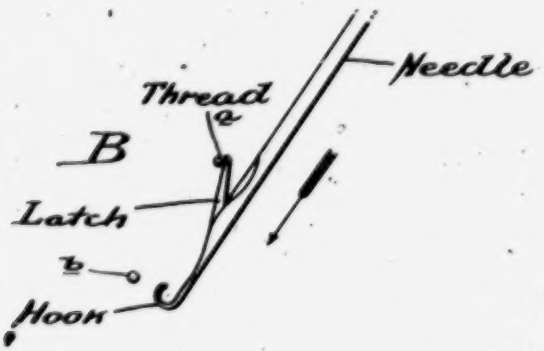
It is evident from the defendants' Brief that they have practically given up the argument which they made so strongly but unsuccessfully in the Circuit Court of Appeals, for the Second Circuit, as did Finch in the District of Columbia in *Finch Corporation vs. The Stelos Company,* 46 Fed. (2d) 606, that infringement of the claim is avoided by the use of a sliding latch needle instead of a pivoted latch needle. The Circuit Court of Appeals, for the Second Circuit, as well as the Court of Appeals of the District of Columbia held that a mechanical difference in the needle does not avoid infringement, especially where defendants use a sliding latch which is the full equivalent of the pivoted latch of the claim.

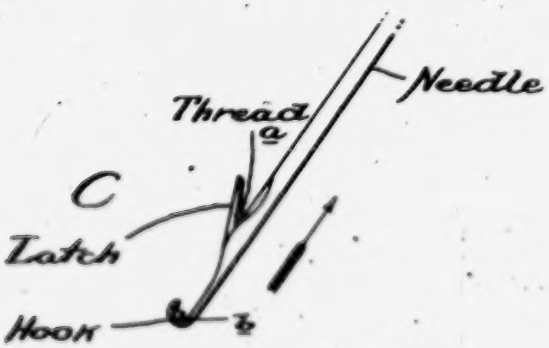
In the Finch sliding latch needle the loop slides back over the hump of the latch and gets behind it for closing in the same way as the loop slides back over the end of a pivoted latch and gets behind it to close the latch. The two perform precisely the same function in the same way and obtain the same result, which, therefore, makes them equivalents. *Union Paper Bag Machine Co. vs. Murphy,* 97 U. S. 120, 125.

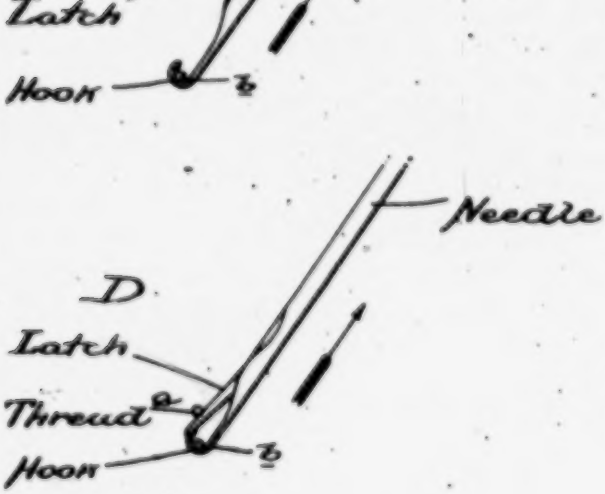
In order that the Court may fully understand the equivalenty of the sliding and pivoted latch needles, a chart opposite this page, graphically illustrates the manner of opening and closing the latches by the threads which opening and closing movements are identical.

Stelos



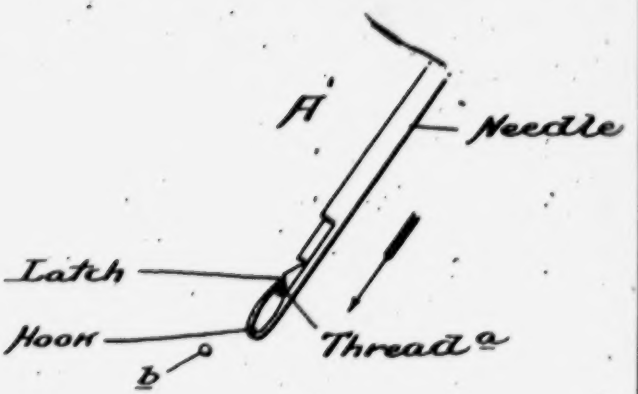


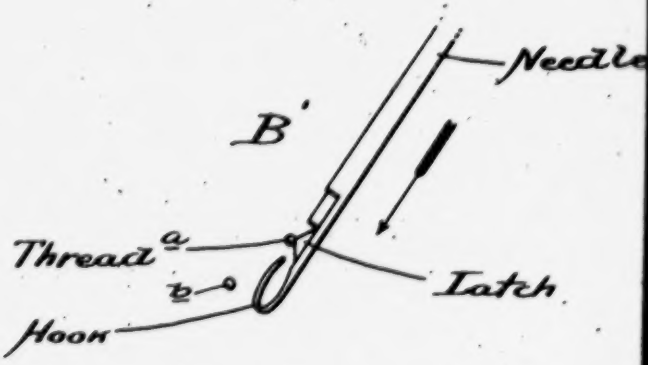


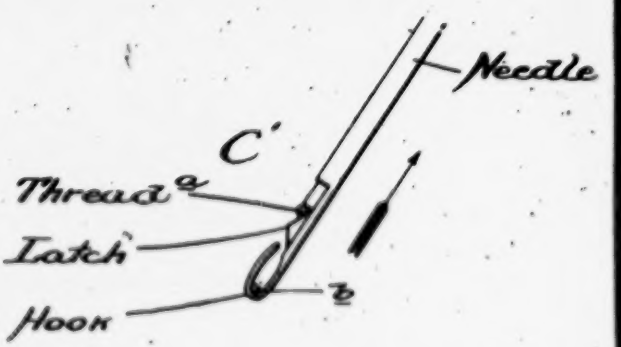


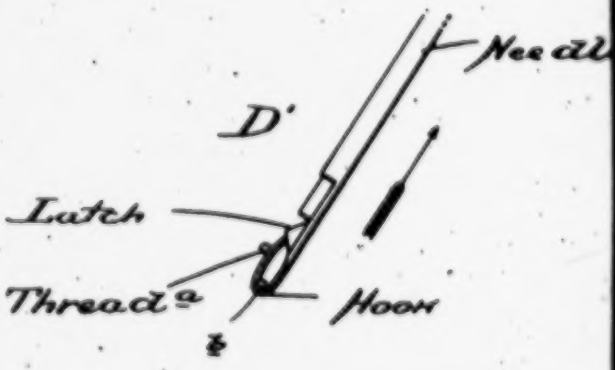
Defendants'

Finch









"Laterally Out of Alignment With the Run", as Used in the Claim, Means at a Substantial Angle to the Plane of the Run

In connection with this phrase, the defendants urge that the Stephens pivoted latch needle must be held off at one side of the run in order to function properly but this is absolutely refuted by the testimony of the witness, Dahn, and by the finding of the District Court (R. 790-791) that the offside position depends upon the length of the pivoted latch and it is not necessary with a relatively short latch.

It has been proven not only by plaintiff's witnesses, but also by admissions of defendants' own witnesses that defendants' operators do hold their needle off at one side of the run, at least some of the time, and that this is possible, is shown by Finch patent 1,674,508 (R. 1366A). See lines 120-122 of page 2 of the patent (R. 1366C).

"Catching the Next Forward Thread in the Hook while the Loop is being Pulled over the Latch, Causing the Latch to Close over the Thread", can be done by a Sliding Latch Needle and is done by Defendants.

In the Stephens patent (R. 961), after the needle is forced downward through the fabric sufficiently far to clear the latch, as in Fig. 4, the movement is reversed and on the upstroke of the needle the next cross-thread *b* is engaged by the hook. Simultaneously, the same upstroke causes the loop *a* to close the latch over the thread *b* thus caught in the hook. This is the action recited in this clause of the claim.

The same action is described in the Finch patent (R. 1366A) which the defendants admit that they follow:

> "• • • as the upward movement of the needle starts, the hook 10 picks up the thread 22, and the loop

> 21 (which lies in the notch 4) forces the latch member downwardly so that the point of the hook enters the opening 5 and closes the hook". (R. 1366C, lines 33-39).

The patent clearly describes that the hook catches the next forward thread at the same time that the loop is being pulled over the latch and closes the latch over the thread caught in the hook. The movements of the hook and latch are simultaneous, but just after the thread is caught in the hook the latch closes the hook, trapping the thread therein.

This was so found by the Court of Appeals of the District of Columbia in *Finch Corp. vs. Stelos Co. Inc.*, 46 Fed. (2d) 606, 608:

> "The purpose of each (latch) is to hold back one loop while the next cross-thread of the ladder is hooked. *Both close the hook and impound the cross-thread on the reverse or upward movement of the needle.* Both then form a bridge over which the loop is finally cast in the final restoration of another loop formed in this way from the hooked cross-thread." (Italics ours.)

The defendants assert that Stephens' claim must be limited to the method *described* in the specification. Defendants are wrong. It is fundamental in patent law that a claim may be broader than the *described* invention. Unless limited by the prior art or proceedings in the Patent Office, the Court should construe the claim broadly. Here, the defendants are trying to read into the claim a limitation to the grasping of the thread by a long pivoted latch and forcing it into the hook, *which limitation was purposely omitted from the claim because Stephens did not want to be limited to it. This, they cannot do.* See page 32 of plaintiff's main brief.

The Defendants Can and Do Hold Their Needle "Laterally Out of Alignment with the Run".

The defendants' argument on this point proceeds on the theory that "laterally out of alignment with the run" means off at one side of the run, and further that the sliding latch needle cannot be held off at one side of the run. Not only was this proven by plaintiff's witnesses, but it was admitted by defendants' witness, Adamcik, that she and others of defendants' operators hold their needle off at one side of the run. (R. 544.) She testified:

> "XQ. 104. I notice that occasionally you are using it just a little off to the side. A. Yes, sir". (R. 541.)

Furthermore, the Finch patent under which defendants are operating positively says that—

> "The needle may, however, be operated satisfactorily when it is held slightly out of such lateral alignment with the run". (R. 1366C, lines 120-122.)

Several of plaintiff's and defendants' witnesses testified positively that defendants' operators hold the needle off at one side of the run, as was admitted by Adamcik, XQ. 104, *supra*.

Because other of the witnesses mentioned that defendants' operators hold the needle as one would hold a pen or pencil, defendants urge that this does not prove that it was off at one side of the run, assuming that the run *might* be turned toward the hand rather than toward the operator's body. But such is not the case. No operator who has testified in this case has held the run in any other way than toward the body. That is necessary in order to follow the reknitting operation, and it is ridiculous to say that the run *might* be turned toward the hand. The operators do not work that way. The run is always toward the body.

At any rate, the defendants perform the method of the patent by an equivalent device which "performs substantially the same function in substantially the same way to obtain the same result" and therefore it is an infringement, even if they should hold their needle awkardly in a vertical plane instead of in an oblique plane. As stated by this Court in *Sanitary Refrigerator Co. vs. Winters*, 280 U. S. 30, 42:

> "There is a substantial identity, constituting infringement, where a device is a copy of the thing described by the patentee, 'either without variation, or with such variations as are consistent with its being in substance the same thing'. Burr v. Duryee, 1 Wall. 531, 573. Except where form is of the essence of the invention, it has little weight in the decision of such an issue and, generally speaking, one device is an infringement of another if it performs substantially the same function in substantially the same way to obtain the same result • • • • Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.
>
> "*Machine Co. v. Murphy*, 97 U. S. 120, 125. And see *Elizabeth v. Pavement Co.*, 97 U. S. 126, 137. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott*, 20 How. 402, 405. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives v. Hamilton*, 92 U. S. 426, 430. And even where, in view of the state of the art, the invention must be restricted to the form shown and decribed by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is never-

theless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare *Duff v. Sterling Pump Co.*, 107 U. S. 636, 639."

However, we submit that we have proved conclusively that the defendants do hold their needle off at one side of the run, hence beyond all doubt, "laterally out of alignment with the run".

The Latch of the Sliding Latch Needle Does "Close Over the Thread".

The defendants urge that their sliding latch does not "close over the thread" if this clause is construed to "mean that the latch *forces the thread into the hook*". The fallacy of that argument is that it ignores the words of the claim; ignores the broadening of the claim purposely so that it would not be limited to the function of a long pivoted latch needle of "grasping the adjacent thread with the latch forcing it into the hook". There was no reason why the method claim should be so limited, and purposely, it was not, thanks to the change from original claim 10 to present claim 23.

The sliding latch closes the hook in the same way as the pivoted latch. Immediately when the upward movement starts, the latch starts to close as described in the Fipch patent (R. 1366C). The hook catches the cross-thread during the upstroke and during closing movement of the latch, the same in both needles.

This phrase "close over the thread" means and can only mean the closing of the hook with the cross-thread therein. Any other interpretation would ignore the broad terms of the claim; it would ignore the interpretation of the claim by defendants' own expert witness, Chapman, who testified that the claim was not so limited; and it would

ignore the file wrapper which shows that the claim was not so limited. The Courts below have consistently refused to accept this argument of defendants because of its obvious fallacy.

Conclusion

Thus it will be seen that defendants have made a prodigious effort to justify their appropriation of the Stephens invention without license or permission.

Stephens saw a commercial necessity. No one ever before conceived of the idea of going through the fabric with a latch needle, at a substantial angle to the plane of the run or fabric. Before Stephens' invention, the only run repairing was by working over the surface, just as a hole in a stocking is darned. Stephens' brilliant idea was to reciprocate through the fabric while stretching the fabric over a suitable holder. This was a brand new idea, and we submit that he is entitled to a fair and liberal construction of his claim.

It is a confession of the weakness of their defense when defendants have cited in the neighborhood of one hundred patents and prior publications, besides unjustifiably taking us to different parts of the country for so-called "public use testimony", in which by the way, Judge Knox had such little confidence that he required them to advance $500.00 expense money for plaintiff.

Boiled down now to Pogson, Semonsen, and Ceska, it can only be taken as a confession on the part of defendants that they have failed utterly to find any adequate prior use or anticipation for the Stephens method.

Defendants are welcome to use anything they can find in Pogson. They are welcome, so far as plaintiff is concerned, to follow the teachings of Semonsen, or to use the Ceska

device. They are welcome to combine the disclosures of any two or three of the foregoing, so long as they adhere to the disclosures of those patents. This they have not done, though they have chosen to follow implicitly the teachings of the Stephens patent in suit, thus trespassing upon plaintiff's right and infringing its patent.

We ask that the decision of the Circuit Court of Appeals, for the Second Circuit, be modified to hold that the claim is both valid and infringed.

Respectfully submitted,

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HENRY GILLIGAN,
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Counsel for The Stelos Co., Inc.

Washington, D. C.,
April 3, 1935.